PETITION

FOR A

WRIT OF

CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 563

EDWARD S. WAGNER CO. INC.,

Petitioner,

v.

JAMES P. MITCHELL, Secretary of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward S. Wagner Co. Inc., hereby respectfully requests this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment of that Court which affirmed the decision and judgment of the United States District Court for the Eastern District of New York.

Opinions Below

The opinion of the District Court (Record below, pp. 23a, 31a) is reported in 115 F. Supp. 118. The opinion of the Court of Appeals appears at page 22

of the Appendix, *infra*. The opinion of the District Court on the first trial of this action (Appendix, *infra*, p. 30) is reported in 89 F. Supp. 304. The opinion of the Court of Appeals on the prior appeal from the first judgment of the District Court (Appendix, *infra*, p. 25) is reported in 187 F. 2d 977.

Jurisdiction

The judgment of the Court of Appeals was entered on November 26, 1954 (Appendix, *infra*, p. 24). The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code (Title 28 United States Code Section 1254; June 25, 1948, c. 646, 62 Stat. 928).

Questions Presented

1. Are persons who, of their own volition, in their own homes, and in their own time, make infants' garments from materials purchased by them at their own expense from sources of their own choice, and ship the finished garments, at will, at their own expense, to various distributors to whom they offer such garments for sale, employees, within the provisions of the Fair Labor Standards Act, of a distributor, who is under no obligation to accept the goods, and often does not do so, and who does not furnish to the persons making the garments, any materials, specifications or instructions and who exercises no supervision or control over the work, but merely pays for such goods as he accepts?

2. Upon the stipulated facts in this case, are the homeworkers with whom petitioner deals, employees

of the petitioner, within the provisions of the Fair Labor Standards Act?

Statutes and Regulations Involved

The pertinent statutes and regulations are set forth in the Appendix, *infra.*

Statement

The facts were stipulated in the District Court. Numbered references in parenthesis in this statement refer to the paragraph numbers of said stipulation printed at pages 17a to 22a inclusive, of Appellant's Appendix in the Court below, herein referred to as the Record.

The petitioner is a distributor of infants' wear consisting of booties, caps and sacks (4, R. 17a). He has been in that business since 1937, in connection with firms known as E. S. Wagner Company and Flagstaff Knitting Mills (5, 6, R. 17a). Prior to October 1938, the effective date of the Fair Labor Standards Act, the articles of infant wear were made for Flagstaff Knitting Mills by women working in their homes who were furnished with materials, designs, samples, patterns and instructions by Flagstaff (7, R. 18a). These women were paid at piecework rates by Flagstaff, who distributed their product through Edward S. Wagner Company (7, R. 18a). At the time of the effective date of the Act, in October 1938, the Flagstaff and Wagner companies were dealing with approximately two hundred homeworkers (10, R. 18a). On or before the effective date of the Act, the Wagner company

notified all such homeworkers to return the materials on hand and they did so (8, R. 18a). After the return of said materials by said homeworkers, the Wagner company notified them and others that it was in the market to buy finished goods made by them (9, R. 18a). After such notice, approximately twenty to thirty of the two hundred homeworkers dealt with by the Flagstaff and Wagner companies continued to deal with said companies (10, R. 18a).

The petitioner corporation, Edward S. Wagner Co., Inc., was organized in November 1939 and began operations in April 1940 purchasing and distributing garments made by persons working in their own homes (11, R. 19a). The yarn used by the persons making the garments is bought by them and is not purchased or supplied by petitioner (22, R. 21a). Such persons deal with other companies as well as petitioner (15, R. 20a). Such persons send in their products to petitioner and the other companies at their own will (14, R. 20a). These products are sent by the suppliers in a completed state (17, R. 20a). Petitioner is in no wise engaged in the manufacture of such products (17, R. 20a). The cost of postage is paid by such persons (21, R. 21a). The petitioner is under no obligation to accept the goods received from such persons and a substantial number of packages received is rejected by petitioner (18, R. 21a). The goods accepted by petitioner are generally paid for at prices offered by it. On occasion petitioner accepts goods at prices requested by the senders (16, R. 20a). Payment for such garments is made at a rate per dozen (18, R. 21a). The number of such persons who at one time or another dealt with petitioner up to February 8, 1949 was three thousand (11, R. 19a). In

1948, petitioner received and paid for goods supplied by eleven hundred and five persons in fourteen states, principally in New England. Of these, two hundred and twenty seven were new suppliers who had no earlier contact with petitioner or its predecessor companies. Of the 1105, 385 sent in packages but once during the year; 251, but twice; and 838, less than five times; 18 averaged one shipment a month and two averaged two shipments a month. The average shipment was less than three dozen garments (11, R. 19a). The net income received by the suppliers from the payment for goods accepted by the petitioner, if computed on an hourly basis, amounts to less than seventy-five cents an hour (19, R. 21a). The petitioner has not obtained homework certificates for such persons nor kept records of hours spent by them in the production of said goods (23, R. 21a). The petitioner ships such goods to its customers in interstate commerce (18, 20, R. 21a).

This action was instituted by William R. McComb, Administrator of the Wage and Hour Division on January 28, 1948 in the United States District Court, Eastern District of New York, to restrain petitioner from violating the minimum wage and record keeping provisions and from shipment in interstate commerce in violation of the provisions of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 201 *et seq.* c. 676, 52 Stat. 1060, as amended by Fair Labor Standards Act, October 26, 1949, c. 763, 63 Stat. 910). Jurisdiction in the United States District Court to maintain the action is provided in Section 17 of the Act (29 U. S. C. 217, as amended October 26, 1949 c. 763 sec. 15, 63 Stat. 919). On July 7, 1950, Maurice J. Tobin, Secretary of Labor, was substituted as plaintiff; on June 22, 1953, Martin P. Durkin, Secretary

of Labor was substituted as plaintiff and on November 9, 1953, James P. Mitchell, Secretary of Labor, was substituted as plaintiff.

The suit was tried in the District Court before District Judge Harold M. Kennedy, who, on May 11, 1950, rendered judgment in favor of the plaintiff against the defendant, holding that the homeworkers were employees of petitioner within the definitions of the Fair Labor Standards Act. The opinion of Kennedy, *J.* (89 F. Supp. 304), is printed in the Appendix, *infra,* p. 30. On March 21, 1951, the Court of Appeals, Second Circuit, reversed the judgment of the District Court on the ground that while it believed the Act broad enough to include the homeworkers in this case, the Administrator's Regulations 516 (Appendix, *infra,* p. 20) defined "industrial homework" as production in a home "for an employer of goods from material furnished directly by or indirectly for such employer." The case was remanded to the District Court to afford plaintiff an opportunity to offer further evidence showing that the workers fall within that definition. The opinion of the Court of Appeals (187 F. 2d. 977) is printed in the Appendix, *infra,* p. 25. The plaintiff did not offer any such proof, but conceded that petitioner did not furnish such materials (Stipulation par. 22 R. 21a). Instead, the Administrator amended his Regulations 516 (Appendix, *infra,* p. 21; R. 6a-14a inc.) to define "industrial homework" as the production by any person in a home "of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production."

On September 7, 1951, the plaintiff filed an amended and supplemental complaint in the District Court, attaching the notice of the amended Regulations and renewing his claim of violation of the Act by petitioner. A second trial of this action was had before District Judge Clarence G. Galston, who, on December 24, 1953, rendered judgment (R. 32a) again in favor of the plaintiff, holding that the homeworkers in this case were employees of the defendant within the provisions of the Act. The opinion of Galston, *J.* (115 F. Supp. 118) is printed in the Record, below, at pages 23a, 31a. An additional issue was raised on the second trial, not raised in this Court, that the amended Regulations were promulgated by the Administrator without compliance with the provisions of the Administrative Procedure Act. On November 26, 1954, the Court of Appeals, Second Circuit, again affirmed the judgment of the District Court. The *per curiam* opinion of the Court of Appeals (F. 2d) is printed in the Appendix, *infra,* p. 22.

Reasons for Granting the Writ

The question is one of importance in the administration of the Fair Labor Standards Act which has not been but should be settled by this Court.

Section 3 of the Fair Labor Standards Act, (29 U. S. C. A., sec. 203), makes the following definitions:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

(e) 'Employee' includes any individual employed by an employer.

(g) 'Employ' includes to suffer or permit to work."

In *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, 728, this Court held that "The definition of 'employ' is broad" though "not so broad as to include those 'who without any express or implied compensation agreement, might work for their own advantage on the premises of another' *Walling* v. *Portland Terminal Co.* 330 U. S. 148, 152. In the same opinion, however, we pointed out that 'This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category'."

In the *Rutherford* case, *supra,* involving meat boners, this Court held them to be employees of the slaughterhouse because "The workers did a specialty job on the production line. The responsibility under the boning contracts without material changes passed from one boner to another. The premises and equipment of Kaiser were used for the work. The group had no business organization that could or did shift as a unit from one slaughterhouse to another. The managing official of the plant kept close touch on the operation" (p. 730).

In *Walling* v. *Portland Terminal Co.,* 330 U. S. 148, 151, this Court held that "the Act covers trainees, beginners, apprentices, or learners, if they are employed to work for an employer for compensation,"

thereby indicating that a hiring is necessary to create the relationship of employer-employee.

Thus, broad as the definition is, a state of facts to be comprehended within its scope must have within it some core of the relationship of hiring and compensation. The question whether all homeworkers are included within the Act, or which of them are not so included, has not been passed upon by this Court.

In *Gemsco* v. *Walling,* 324 U. S. 244, 258, it was conceded that the homeworkers were employees, since the work was distributed to the workers directly by the manufacturer who paid them wages for the work done. This Court held that the homework in the *Gemsco* case was not an independent industry but was conducted largely by the same employers who maintained factory establishments and the fact that the employees worked in the home and not in the factory did not exclude them from the operation of the Statute. The Court further stated that the evidence and findings in the case showed that the prohibition against homework "will not eliminate the great majority of homeworkers from the industry; but on the contrary will result only in the transfer of the scene of their work from the home to the factory and will do this without undue hardship."

Various Courts of Appeals and District Courts have determined the question of whether an employer-employee relationship existed with respect to homeworkers under varying states of facts.

In *Walling* v. *American Needlecrafts,* 139 F. 2d 60 (C. A. 6), the Company was engaged in the manufacture and processing of comforters and kindred ar-

ticles. The material was cut and stamped by the Company with the design for the required needlework and was then delivered to the homeworkers for appliqueing and monogramming. The homeworkers were required to comply strictly with the patterns and specifications furnished and were instructed as to the kind and color of thread to be used. A date was set for the completion of the work. Compensation was fixed by the Company. The Company secured its homeworkers through local newspaper advertising, personal solicitation and through other homeworkers. They were required to prove their qualifications before receiving work and, in some instances, received instruction from the Company. The simple equipment necessary was provided by the homeworker.

The Court in the *American Needlecraft* case, held the homeworkers to be employees under the definition of "employ" as "to suffer or permit to work" in Section 203 (g) of the Act. The Court held (p. 64) that said definition included "workers who perform for an industry under circumstances which create an obligation on the part of the industry receiving the benefit of such work, to pay compensation directly to them". The Court also quoted the testimony of the then Assistant Attorney General (subsequently Mr. Justice) Robert H. Jackson before the legislative committee on the original bill to the effect that the Black-Connery Bill was intended to include control over industrial homework practices in that "the factory which sends out and makes use of people in their homes are not exempt just because they are using premises they do not pay rent for". Continuing with

its discussion of the Assistant Attorney-General's testimony the Court said (p. 64):

> "While he was careful to indicate that probably not all persons designated as homeworkers would be reached by the Bill, in saying that 'the family that engages in some little commodity which is a homecraft, as you might call it, on its own, would probably not be reached by the Bill' it was manifest that he had in mind crafts other than those by which articles are processed for manufacturing industries, which furnished the material, instruction and design, and market broadly the completed product. We find it unnecessary to determine whether all homeworkers come within the purview of the Act, but are compelled by the scope of its definition of the term 'employ' to hold that the workers here considered are within its protection."

In *Glenn* v. *Beard* (C. A. 6), 141 F. 2d 376, the same bench as in the *American Needlecraft* case, held that precisely similar homeworkers were "independent contractors" and not "employees" under the Social Security Act.

Other decisions holding workers to be employees have in them, some or all of the following elements: a hiring; an obligation for the payment of compensation; control over the hours of work; the right to hire and discharge; the furnishing of materials upon which the work is to be performed; the furnishing of tools; supervision over or instruction to the worker; the furnishing of patterns, specifications or designs as to the work to be done or the product resulting from such work; the work done is part of a completed

operation upon which work is performed, as to other parts, by other workers who are employees. (*Walling* v. *Twyeffort Inc.* (C. A. 2), 158 F. 2d 944, cert. den. 331 U. S. 851; *McComb* v. *Homeworkers Handicraft Co-Operative* (C. A. 4), 176 F. 2d 633, cert. den. 338 U. S. 900; *United States* v. *Vogue Inc.* (C. A. 4), 145 F. 2d 609; *Fleming* v. *Palmer* (C. A. 1), 123 F. 2d 749, cert. den. *sub nom.; Caribbean Embroidery Cooperative,* 316 U. S. 662; *Fleming* v. *Demeritt Co.* (D. C. Vt.), 56 F. Supp. 376; *Walling* v. *Freidlin* (D. C. Pa.), 66 F. Supp. 710; *Walling* v. *Wolff* (E. D. N. Y.), 63 F. Supp. 605; *Tobin* v. *Harwood* (not officially reported), 10 W. H. cases 73, affd. 194 F. 2d 538).

In cases where these elements were absent, the employer-employee relationship was held not to exist (*Helena Glendale Ferry Co.* v. *Walling* (C. A. 8), 132 F. 2d 616, 620; *Walling* v. *Sanders* (C. A. 6), 136 F. 2d 78, 81; *Bowman* v. *Pace* (C. A. 5), 119 F. 2d 858; *Dugas* v. *Nashua Mfg. Co.* (D. C. N. H.), 62 F. Supp. 846, app. dism. 154 F. 2d 655).

As evidenced by the adjudicated cases, *supra,* the furnishing to the worker of the materials to make the product is a vital element in establishing the employer-employee relationship. For, where the materials are so furnished, implicit therein is a hiring and a promise to pay for the work done thereon. No reservation of the right to reject the work and not to pay for it can be presumed under such circumstances. Also implicit and inherent in the furnishing of the material is the giving of instructions as to the form, nature, specification and design of the work, so as to supply the finished product ordered by the furnisher of the material. The furnishing of the

materials, likewise has implicit in it, that the finished product will be returned to the furnisher of the materials. They would and could not, under such arrangement, be sent, at the homeworker's option, to some other dealer. In a true sense, therefore, the homeworker is employed by the furnisher of the materials.

Where, however, as in this case, a woman of her own volition, purchases her own materials, and is left to her own device and design as to what she will make with it, a distributor knows nothing of it, until the time, in the future, when, unsolicited by him, he receives in the mail a package from her containing the finished product with an offer to sell it to him. He may then, as any prospective buyer, accept the offer or reject it. If he rejects it, he has established no relationship with the offeror. If he buys the merchandise, he is just that, a buyer of merchandise which he has not previously ordered and which might just as well have been, and possibly was, offered to other prospective buyers in the field.

The Administrator, himself, recognized that Congress, in the Act, intended, with respect to homeworkers that the material be furnished to the worker in order to make the worker an employee. Thus, in his original Regulations 516 promulgated September 15, 1941, amended April 1, 1944 and June 19, 1950 (Appendix, *infra,* p. 20), the Administrator defined industrial homeworkers as "any person producing in or about a home, for an employer, goods from material furnished directly by or indirectly for such employer".

The Court of Appeals, on the first appeal in this case (187 F. 2d 977; Appendix, *infra,* p. 25), held that since such element was not shown to be present, the petitioner was not a violator of the Act, and reversed and remanded the case to afford the Administrator an opportunity to submit proof of such vital ingredient. Instead of offering any proof of such furnishing of materials, which was admittedly not the fact (Stipulation, par. 22, R. 21a), the Administrator, on April 28, 1951, proceeded to amend the Regulations 516.21 to read as follows (R. 6a-14a; Appendix, *infra,* p. 21):

> "'Industrial home work' as used in this section, means the production by any person in or about a home, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.
>
> The terms 'person', 'employ', 'employer', 'employee', 'goods' and 'production' as used in this section is the same as in the Act."

The Administrator's notice of amendment of Regulations states the amendment to be a clarifying one (R. 7a). It was plainly more than this. Under the prior Regulations, the petitioner was not a violator of the Act. The Regulations were amended with the specific design of making him a violator. A regulation which changes its definition so as to include one previously excluded is a new and different regulation.

However, as the Regulation itself says, the definition "employee" therein is as set forth in the Act.

Therefore, it is the language of the Act which is decisive and not the Regulation. The interpretation of the Act by the Court below goes far beyond the intent of Congress in defining the employer-employee relationship.

When the Fair Labor Standards Act Amendments were enacted in 1949, an amendment by Mr. Cooper of Tennessee was passed in the House, exempting rural home workers. This was introduced as a clarifying amendment, since it was agreed by the sponser of the amendment and the author of the bill, Mr. Lucas of Texas, that the Act never intended to include such homeworkers who were deemed not in the employ of anyone, but sellers. The history of the amendment and the debate thereon are printed in the Appendix, *infra*, at pages 41-44.

The respondent, in the Court below, sought to raise the inference that the course of dealing of the petitioner was an evasion of the Act. This claim is based on the fact that for a period of about one year, from 1937 to the enactment of the Act in 1938, the petitioner's main officer was associated with firms that did furnish the materials to homeworkers with designs and instructions, for which payment was made at piecework rates (Stipulation par. 7, R. 18a). Such activity violated no law. But as soon as the Act went into effect, the firms with which petitioner's main officer was associated discontinued these operations (Stipulation par. 9, 10, R. 18a). Since that time, petitioner has refrained from furnishing any materials or of giving any directions or supervision to any homeworkers and has had no connection with their activities until they, of their own volition, offered him merchandise for sale. This was not a violation under

the Administrator's own Regulations, as the Court of Appeals, on the first appeal, held. Of those homeworkers with whom petitioner's predecessors dealt in October, 1938, only twenty to thirty continued to deal with them by offering their own product for sale (Stipulation par. 10, R. 18a). Since most of these women offering merchandise for sale are transient and isolated sellers (Stipulation par. 11, R. 19a), it is a safe assumption that none of these twenty or thirty still deal with petitioner. So that none of the women now offering garments for sale to petitioner as a prospector buyer, ever dealt with petitioner in any other fashion.

Furthermore, the judgment herein does not bar home workers from continuing to make things in their homes. It bars petitioner from buying from them. They will, therefore, offer their products to others. If these others are newcomers in the field, or were not, as petitioner's predecessors were, in business before 1938, and operated in no other way, they would not be burdened by such background. If these activities are not a violation of law, then these persons are free to continue in business. The effect of this would be to discriminate against petitioner in favor of its competitors. The reference to the past history of the petitioner's predecessors to indicate that the change in the method of operation was an evasion of, rather than a compliance with the Act, is therefore irrelevant and immaterial. The basic issue, applicable to all persons involved, is, are these homeworkers under their present method of operation, employees of persons, who like petitioner, merely buy their finished product?

If these homeworkers are employees of petitioner, when does their employment begin and when does it

end? Certainly, when a woman in her own home, out of her own material, makes a garment, unknown to the petitioner, she is not an employee of petitioner. If she mails petitioner her product and petitioner rejects it, she certainly does not become its employee. If petitioner accepts it, does the supplier become an employee as of the date of acceptance? If so, she was not an employee when the garment was produced. If the employment becomes, upon the sale, retroactive to the production, how can petitioner keep the required records as to persons he may never have heard of when they produced the product? If a home worker makes one isolated sale to petitioner, does the employment end with the sale? If her subsequent product is sold to other distributors does she remain petitioner's employee? The effect of the decision below, is to make the petitioner an employer, by purchase, of persons he may never have heard of before and may never hear from again. Such a holding gives the Administrator carte blanche to define "employee" at his own whim, as he did in this case by manipulating his Regulations in an effort to fit petitioner. Thus, the enforcer of the Act makes his own rules, and may thereby eliminate any home worker he pleases from the field of production. "This is delegation running riot" (Cardozo, *J.* in *Schecter* v. *United States,* 295 U. S. 495, 553), and would make the Administrator and not Congress, the determinant of the scope and application of the Act.

As above stated, the judgment herein does not and cannot bar the homeworkers from making the product. They will continue to do so. They will not, as in the *Gemsco* case, *supra,* move from the home to the factory. Such a result is an impossibility from the very nature of these rural workers. As long as

they make these garments, someone will buy them and they will inevitably find that someone, as a means of marketing the product. What, for example, is to prevent these women from obtaining a list of the stores that sell these garments, and from soliciting these stores to buy directly from them? If so, would each of the storekeepers who accepts such an offer of sale and buys, become the employer of the vendor? If so, the logical extension of the decision in this case could well be the death knell of handcraft made in the homes for resale.

The determination of the question presented in this case is of vital public importance, since many thousands of persons throughout the country who make things for resale in their own homes on their own time and initiative are concerned thereby. If these persons come within the Act, this is of extreme importance in the administration of the Act, for, in the end, it may mean the eventual elimination of every nature and description of homework at the election of the Administrator. It is a question which should be settled by this Court so that all homeworkers and the Administrator, as well, should know where they stand.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

IRWIN N. WILPON,
Counsel for Petitioner.

January 1955.

APPENDIX

Statutes

Fair Labor Standards Act: C. 676, 52 Stat. 1060, 29 U. S. C. 201, as amended by Fair Labor Standards Amendments of 1949, Act of October 26, 1949, c. 736, 63 Stat. 910.

Sec. 3 (29 U. S. C. 203)—Definitions

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *

(e) "Employee" includes any individual employed by an employer.

* * * *

(g) "Employ" includes to suffer or permit to work.

Sec. 6(a) (29 U. S. C. 206) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than 75 cents an hour;

* * * *

Sec. 11(c) (29 U. S. C. 211) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary

or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

Regulations

Regulation 516.11 of the Administrator, Wage-Hour Division effective September 15, 1941, Amended April 1, 1944.

Homeworkers

Every employer who directly or indirectly distributes work to be performed by an industrial homeworker[2] shall maintain and preserve pay-roll or other records * * *"

[2] The term "industrial homeworker" means any person producing in or about a home, for an employer, goods from material furnished directly by or indirectly for such employer.

Regulation 516.21 of the Administrator, Wage-Hour Division effective June 19, 1950.

Industrial Homeworkers

(a) *Definition of Industrial Homeworker*

For purposes of this section, the term "industrial homeworker" means any person producing in or

about a home, for an employer, goods from material furnished directly by or indirectly for such employer.

Regulation 516.21 of the Administrator, Wage and Hour and Public Contracts Division, effective May 3, 1951. (Administrator's Notice of Amendment of Regulations is printed at page 6a of the record below.)

Industrial Homeworkers

(a) *Definitions.* "Industrial homeworker" and "homeworker" as used in this section, mean any employee employed or suffered or permitted to perform industrial home work for an employer.

"Industrial home work" as used in this section, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

The terms "person", "employ", "employer", "employee", "goods", and "production" as used in this section is the same as in the Act.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 34

October Term, 1954

Argued November 10, 1954

Decided November 26, 1954

Docket No. 23063

JAMES P. MITCHELL, Secretary of Labor,

Plaintiff-Appellee,

v.

EDWARD S. WAGNER CO., INC.,

Defendant-Appellant.

Before—CLARK, *Chief Judge,* and FRANK and HARLAN, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, Clarence G. Galston, Judge.

Defendant appeals from a judgment in favor of the Secretary of Labor, enjoining it from violation of the Fair Labor Standards Act. D. C. E. D. N. Y., 115 F. Supp. 118. Affirmed.

BESSIE MARGOLIN, Chief of Appellate Litigation, U. S. Dept. of Labor, Washington, D. C. (Stuart Rothman, Sol., Sylvia S. Ellison, Atty., U. S. Dept. of

Labor, Washington, D. C., and John A. Hughes, Regional Atty., New York City, on the brief), for plaintiff-appellee.

CHARLES M. JOSEPH, New York City, (Benjamin L. Lasky, Brooklyn, N. Y., on the brief), for defendant-appellant.

Per curiam.

This is an appeal from an order enjoining defendant from further violating the Fair Labor Standards Act, §§ 6, 15(a), 29 U. S. C. §§ 206, 215(a), and administrative regulations pursuant thereto, 29 CFR 617, 516 (as amended in 1951). On a prior appeal this court held that industrial homeworkers employed by defendant were covered by the Act, but not by the regulations then in effect. *Tobin* v. *Edward S. Wagner Co.,* 2 Cir., 187 F. 2d 977. Subsequent to that decision the regulations were amended to their present form. Judge Galston has found that the defendant's operations fall within the amended regulations and that the regulations were properly promulgated under the Administrative Procedure Act, 5 U. S. C. § 1003(a). D. C. E. D. N. Y., 115 F. Supp. 118. We see no reason to overturn his well-reasoned conclusions. While there was no advance notice of the amendment, yet that was not necessary, both because of its nature as an "interpretative" rule and because of the Administrator's finding of "good cause" for immediate action, based upon the fact that other employers in general were complying with this interpretation of the Act and defendant had long known of the view held by the Administrator.

Affirmed.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of November one thousand nine hundred and fifty-four

Present—Hon. Charles E. Clark, *Chief Judge,*
Hon. Jerome N. Frank,
Hon. John M. Harlan, *Circuit Judges.*

James P. Mitchell, Secty of Labor,
Plaintiff-Appellee,

v.

Edward S. Wagner Co., Inc.,
Defendant-Appellant.

Appeal from the United States Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

A. Daniel Fusaro,
Clerk.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(187 F. 2d 977)

No. 112—October Term, 1950

Argued February 7, 1951

Decided March 21, 1951

Docket No. 21793

MAURICE J. TOBIN, Secretary of Labor,
Plaintiff-Appellee,

v.

EDWARD S. WAGNER CO., INC.,
Defendant-Appellant,

and

EDWARD S. WAGNER,
Defendant.

Before—L. HAND, SWAN and FRANK, *Circuit Judges.*

Appeal from a judgment of the District Court of the United States for the Eastern District of New York. Reversed and Remanded.

BENJAMIN L. LASKY (Charles M. Joseph, of counsel) for Defendant-Appellant.

JOHN A. HUGHES (William S. Tyson, Bessie Margolin, Helen Grundstein, of counsel) for Plaintiff-Appellee.

The facts (except those added in the opinion of this court) are stated in the opinion of the District Court, 89 Fed. Supp. 304.

* * * *

FRANK, *Circuit Judge:*

In the light of *Gemsco* v. *Walling,* 324 U. S. 244,[1] and especially because of the subsequent addition of Section 11 (d) of the Act[2] we think the Act sufficiently broad to authorize an administrative order or regulation including homeworkers engaged in activities such as those who dealt with the defendant here. That was the issue presented to the trial judge and chiefly argued on this appeal. Were there no more to the case, we would affirm.

However, in a footnote in defendant's brief, and in its oral argument, in this court, it was also argued that the homeworkers here were not within the scope of the Administrator's regulation. Those regulations contain this definition: "As used in these regulations, the term 'industrial homework,' means the production of any person in or about a home, apartment, tenement or room, in a residential establishment, for an employer of goods from *material furnished directly by or indirectly for* such employer."[3] There is no

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[1] See also the discussion in the opinions of this court in that case, 144 F. (2d) 608 (C. A. 2).

[2] Section 11 (d), 29 U. S. C. § 211 (d), added in 1949, reads as follows:

"(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this chapter and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect."

[3] 7 F. R. 2593. 29 CFR 617.101. Emphasis added.

evidence to show that the material was thus furnished by defendant.[4]

Plaintiff argues that this was an unintended loophole in the regulations; that the public hearings which preceded the issuance of the regulations disclose that the regulations were meant to cover such homeworkers as those here; and that, recognizing the administrative purpose, we should not construe the regulations literally.

Were we interpreting a statute to ascertain what power it conferred on an administrative officer, much could be said for such an argument. Beginning at least with Aristotle, it has often been recognized that, as a legislature cannot foresee all possible particular

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[4] At the trial, the following colloquy took place between Mr. Funston, for appellee, Mr. Lasky, for appellant, and the court:

"Mr. Funston: Then Wagner continued to do business with the people who were making the yarn—making the infant's wear, I mean, and they did, as Mr. Lasky says, purchase their materials. Now——

Mr. Lasky: When you say they did purchase the material, you mean——

Mr. Funston: The People.

Mr. Lasky: The Workers.

Mr. Funston: The people working in their homes, the workers, would write to the yarn companies——

Mr. Lasky: Yes.

Mr. Funston: And purchase their materials.

Mr. Lasky: Yes.

Mr. Funston: At the present time every one that we have a deposition from purchased materials from the same source—Irving Cohen & Company. That has not been true in the past. There is documentary evidence and other evidence to show that Mr. Wagner has at times given the names of yarn companies to the defendants—I mean to the homeworkers. That is, places where they could buy yarn.

Mr. Lasky: And it should be stated——

Mr. Funston: All right.

Mr. Lasky: —that Irving Cohen Yarn Company is in no way connected, directly or indirectly, with the defendants in this case. They are not known to each other.

The inference there might be that we are working with

instances to which legislation is to apply, it must therefore be reasonably so interpreted to fill in gaps.[5] But when the legislature delegates to an administrative official the authority, by "sub-legislation" to issue regulations, in order to fill in those gaps, then the regulations precisely because they particularize, ought not be as generously interpreted as the statute. In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover. True, in deciding what they do cover, we must not regard their literal terms merely, but must also give much weight to administrative interpretive rulings which have been published and of which the regulated are thus on notice.[6] But here there were no published rulings giving the construction for which plaintiff contends.

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the Irving Cohen Yarn Company. We don't know them. We have never been there. We have never had any transactions directly with them. . . .

The Court: Mr. Funston, do you claim that there is any connection between Cohen and Wagner in the sense of a controlling connection?

Mr. Funston: I don't know. I will not offer any testimony to that effect.

The Court: If it were so the burden would be on you.

Mr. Funston: The burden would be on us, and I will state that at this time I have no evidence to show it, no evidence that there was any control.

The Court: If you say you don't know, I will assume that there is none."

The Court found:

"9. All of the suppliers paid for their own yarn and for parcel post charges."

[5] See *Usatorre* v. *Victoria*, 172 F. (2d) 434, notes 12-16 (C. A. 2); *Guisseppi* v. *Walling*, 144 F. (2d) 608, 615 *et seq.* (C. A. 2); *N. L. R. B.* v. *National Maritime Union*, 175 F. (2d) 686, 690 and notes 4-5 (C. A. 2).

[6] *Walling* v. *Brooklyn Braid Co.*, 152 F. (2d) 938, 940 (C. A. 2); *Walling* v. *Cohen*, 140 F. (2d) 453, 455 (C. A. 3). See also *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413-414.

However, as the defendant's argument based on the definition in the regulations was first made in this court, we will remand the case to afford plaintiff the opportunity to offer further evidence, if he so desires, showing that the workers fall within that definition.

REVERSED and REMANDED.

THOMAS W. SWAN, Circuit Judge, concurs in the result.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

(89 F. Supp. 304)

Civ. 8847

January 25, 1950

WILLIAM R. MCCOMB, Administrator of the Wage and Hour Division, United States Department of Labor,

Plaintiff,

—against—

EDWARD S. WAGNER COMPANY, INCORPORATED, and EDWARD S. WAGNER,

Defendants.

APPEARANCES:

JOHN A. HUGHES, Regional Attorney, U. S. Department of Labor, attorney for plaintiff (C. Ira Funston, Supervising Attorney).

BENJAMIN L. LASKY and CHARLES M. JOSEPH, attorneys for defendants.

KENNEDY, *J.*

This is a suit for a permanent injunction. The defendants are charged with violation of the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201 *et seq.*).

Some explanation ought to be made of the condition of the record of the trial. At preliminary discussions

between counsel and the court it seemed to be obvious that the underlying facts were substantially undisputed. Depositions had been taken in the case, and a good deal of documentary evidence collected. But at the time of the trial, I thought, and I still think, that it was perfectly possible for counsel to stipulate all the operative facts. However, as is often the case, each side was desirous of stressing some factual elements and minimizing others, and there ensued a long rambling discussion between counsel and the court. The upshot of this discussion was not a stipulation, as had been hoped, but the introduction of the evidence.

What follows is my own skeletonized summary of the facts, as established, not only by the evidence but by the unchallenged statements of counsel. Edward S. Wagner Co. Inc. (hereafter called Wagner, at least as to matters occurring after 1940) is a distributor of infants' wear. Its line of goods consists of bootees, caps and sacques (or sets of these). The individual defendant Wagner dominates and controls the corporation (reference to "Wagner" include the individual). Wagner has been in the same business since 1937. Prior to October 1938 business was transacted in the name of E. S. Wagner Company (a trade name). There was, however, an affiliate called Flagstaff Knitting Mills (which was also a trade name). The business was financed by a man named Meyers, now dead, and Wagner's role was that of employee, managing agent, or managing partner—it does not much matter which, for present purposes. Through Flagstaff Knitting Mills, prior to October 1938, the enterprise employed home workers who were paid at a piecework rate. These home workers were furnished with designs, samples, patterns and instructions by Flagstaff, and their product was distributed through

E. S. Wagner Company. At or shortly before the effective date of the Fair Labor Standards Act, Wagner notified all the home workers that it was no longer possible that they be compensated as such, and that they must return the materials on hand, which was done. However, some of these persons continued to supply the same goods, either on the invitation of Wagner or in the hope that he would buy them. In November 1939 the Wagner Corporation was organized but it did not actually begin operations until April 1940. In the interval Meyers died and Wagner purchased his interest. Between 1939 and 1948 the number of suppliers (i. e., persons who knitted the products at home), who at one time or another furnished goods, had reached a figure of about 3,000. This is not to say that there were 3,000 persons continuously supplying Wagner with goods; as might be expected, some of them from time to time ceased production or sold their goods elsewhere. In the year 1948, for example, 1,105 persons supplied goods. They resided in 14 different states—principally in New England—and they sent in 3,437 packages (9,282 dozens); 227 were new suppliers who had no earlier contact with the Wagner Corporation, or with Wagner. All of these persons paid for their own yarn and paid the parcel post charges. Although most of the suppliers bought their yarn at one source, that fact is probably irrelevant, because concededly there was no relationship between Wagner and any yarn manufacturer in the way of facilitating credit arrangements or in discharging any of the obligations of Wagner suppliers to yarn manufacturers. It is generally true that Wagner did not purchase all of the material sent in; in fact, the percentage of rejections was very high, probably amounting to ⅔rds of

the number of packages received. I have previously mentioned that Wagner did not furnish designs. It did from time to time suggest to suppliers that the yarn used by that particular person was unacceptable and of course from time to time it told suppliers that the design followed by that supplier was not what was wanted and made suggestions concerning how it could be improved.

Enough has been said at this point to foreshadow what the controversy is about. The plaintiff administrator takes the position that those who supply defendants with goods are under the coverage of the Fair Labor Standards Act; Wagner Corporation and Wagner himself urged that they are not employees, but independent contractors.

It is not surprising that very soon after the enactment of several types of social legislation the same thought occurred to many lawyers who are advising business men: that it might be possible to remove from the coverage of the act large numbers of persons connected with any particular business, if those persons could be given the common law status of "independent contractors". But in every instance Congress had wisely framed such legislation in language which negatived the idea that the word "employ" was used in the common law sense. Thus it happened that newsboys were held to be employees so far as labor relations were concerned (*Board* v. *Hearst Publications,* 1944, 322 U. S. 111), and that coal unloaders who worked only casually were nevertheless employees for purposes of social security (*U. S.* v. *Silk,* 1946, 331 U. S. 704). Dealing with the very act here under consideration, Judge Frank says (*Walling* v. *Twyeffort, Inc.,* 2 Cir. 1947, 158 F. 2d 944, 947, 948) that "Drawing the line between employees and independ-

ent contractors cannot be done mechanically; it calls for rational judgment as the facts vary, but that need not terrify us".

Of course industries which employ persons working at home have provided fertile fields for debate concerning the line of distinction between independent contractors and employees spoken of by Judge Frank (e. g., *Walling* v. *American Needlecrafts,* 6 Cir., 1943, 139 F. 2d 60; *Walling* v. *Wolff,* E. D. N. Y., 1945, 63 F. Supp. 605). But the Fair Labor Standards Act uses a definition of the word "employ" which, according to Mr. Justice Black (then a Senator) "is the broadest definition that has ever been included in any one Act" (81 Cong. Rec. 7657).

The plaintiff in this case suggests that the rationale of all the cases already mentioned, as well as that of *Rutherford Food Corp.* v. *McComb,* 1947, 331 U. S. 722, supplies six tests which are useful in the determination of the nature of the relationship between the employer and the supplier or worker:

(1) Is the service rendered an integral part of the employer's business?

(2) What is the extent of the so-called contractor's investments in facilities and equipment?

(3) Is the relationship characterized by permanency and long duration?

(4) To what extent does the principal exercise control over the individual whose status is in question?

(5) What opportunity does the so-called contractor have for profit or loss as the result of sound management or risk undertaken?

(6) What amount of initiative judgment and energy is required for the success of the enterprise which is claimed to be independent?

It would be very unwise to say that these are all the tests that can be used, or to say that any particular one is controlling, or that a majority of negative or affirmative answers, as the case may be, will furnish the solution. To do this would be to draw the line "mechanically", but a consideration of each one of these questions separately will at least serve to narrow the dispute.

In the case at bar there is no question at all that those who supply Wagner products are an integral part of the business. Nor is there any doubt that the investment in facilities and equipment on the part of these suppliers is negligible in amount. Again, the opportunity for profit or loss arising from sound management, or the risk undertaken is negligible or nearly so. The suppliers in this case, as in the case of ordinary pieceworkers under the coverage of the act will be compensated in proportion not to their sound management but to the number of pieces they turn out, because they must take Wagner's price or leave it. And for the same reason initiative, judgment, and energy play a very minor role in the "enterprise" which the suppliers conduct.

This leaves for consideration questions about the permanency and the duration of the relationship between the suppliers and the defendants, and also questions about control. Actually the argument of the defendants here is that the relationship found in the case at bar will not come under the definition of employment in the Act, broad as that definition is, because two very obvious features of the relationship

are impermanence, and want of control on the part of the defendants. In the briefs this argument is stated in another and in a narrower way: the defendants urge that the act does not apply because there is no "contract" of employment. But what defendants really intend to say is that the personnel of the suppliers constantly shifts. Some drop out, and others commence to send in goods. There is no solicitation or at least no direct solicitation nor is there any direct advertising. The list of suppliers grows because women living in the neighborhood of those who are sending in goods learn about the enterprises and offer their product to the Wagner Corporation. Some of these persons unquestionably send their goods to other distributors besides Wagner. I can best summarize defendants' argument, I think, by paraphrasing, and in part quoting, portions of their reply brief. It is admitted that Wagner Corporation has held itself out as ready and willing to purchase what the home workers made, but this it did, so it is said, in the same sense in which "any dealer in merchandise is in the market to buy". Moreover, say the defendants, no rights are created until one party offers its goods and the other accepts them. Therefore, the argument runs that until a sale takes place, no obligation is created, and when it does, it has no retroactive effect so as to constitute an actual "hiring". In other words, the defendants admit that absence of supervision is irrelevant to the question of "control"; but they say that there is no hiring or employment even in the statutory sense, unless there is an obligation arising contemporaneously with the beginning of the relationship.

In the *Needlecrafts* case, *supra,* the court (6 Cir., 139 F. 2d 60, 63, 64) discusses *Bowman* v. *Pace Co.,*

5 Cir., 1941, 119 F. 2d 858, 860, where "wage liability" was spoken of as the test of "employment". In the *Needlecrafts* case Judge Simons, interpreting the statute and the *Bowman* case, uses language which the defendants here not only quote but underscore in the brief. That language is to the effect that the coverage of the act extends to:

> "workers who perform for an industry under circumstances which create an obligation on the part of the industry receiving the benefit of such work, to pay compensation directly to them * * *".

I pass the point that this quotation is taken from its context, where Judge Simons was really dealing with the problem of the "intermediate contractor". What is more important is the question what was intended by the word "obligation" in the passage quoted.

The defendants, as I have already indicated, not only insist that "employment" requires an obligation: they say that the obligation must be contemporaneous with the creation of the relationship and that otherwise there is no hiring. They urge that no traditional bundle of rights and liabilities (including "obligation" to pay) is created until there has been acceptanace of the goods, *i. e.,* a sale.

I do not agree that Judge Simons used the word "obligation" in any such narrow sense. The whole tenor of his opinion in the *Needlecrafts* case contradicts any such notion. It is unnecessary to consider on broad grounds how defendants' position can be reconciled with the fact that Congress, by this statute, intended specifically to cover pieceworkers, whose legal relationship to their "employer" in many in-

stances is only a "contract" by courtesy. It is only necessary to consider the specific facts in the case at bar to reach the conclusion that, here at least, the pieceworkers are in every fair sense of the word employees.

The defendants are constrained to admit that the very existence of their business depends upon the products of their suppliers. They point out, however, that they are free to reject any or all of the goods, or to vary prices as they wish. But common sense requires one to postulate that having created and organized their business and presumably developed a market for their goods, the defendants are not going to reject articles sent to them to the point where they have no goods to supply (although they could do this "legally"), nor will they be foolish enough to slash prices to the point where they kill their source of supply (although they could also do this "legally"). One would rather expect that they will accept goods on a scale commensurate with their demands, and will pay prices which will insure a reasonably steady supply. And if they adopt this very sensible procedure they must necessarily follow what the plaintiff calls a "course of conduct", under which they "suffer" the suppliers to "work" for them. And there is surely upon them a continuing "obligation" to pay for the goods they receive and retain at reasonable prices and with reasonable promptness.

I see no insuperable objection to calling this a relationship of employment, under the statute, merely because there may be technical objections to suits for breach of contract by the workers, or similar suits by the defendants, or in general, difficulties about defining the incidents of the relationship in legalistic

terms. It has been said before that the Wage and Hours Act gives rise to problems which cannot be dealt with mechanically. Perhaps it is true that the worker and the employer would be turned out of court in an action at law based upon their relationship, but that does not necessarily mean that the employer can refuse to comply with the Act.[1]

The defendants make much of certain statistics which emerge from their transactions of 1948. There were, as I have said, 1105 suppliers. Only 18 of these averaged one shipment a month and only two averaged two shipments a month. Of the same total as many as 385 persons made sales to the company only once during the year, 251 made only 2 sales and 878 (87% of the total) made less than 5 sales. The average shipment amounted to less than three dozen garments. Still these figures show only that the bulk of the home workers are not as active as might be expected, and that in many instances the suppliers work only sporadically. If I am right in my reading of the *Silk* case, *supra,* this does not change the result.

Finally, the fact that in the *Needlecrafts* case, and others like it, the defendant furnished to the home workers a design which was to be followed does not, as defendants seem to think, establish that the act is inapplicable when no design is furnished. After all, the garments dealt in by the defendants can be made and marketed on the basis of three major designs.

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[1] As a matter of fact, it would not take much ingenuity to spell out an enforcible "contract" under the circumstances found in the case at bar, or perhaps a "quasi-contract". A promise would surely be implied from the fact that the defendants became indebted to the suppliers by retaining their goods, and actually the defendants' "course of conduct" has as its root a general promise of payment to those who will produce the garments. The fact that the promise is subject to some escape clauses does not change its fundamental nature.

Minor differences, such as embellishment, are not of very grave importance and if they were, the evidence discloses that from time to time the defendants informed their suppliers concerning what was wanted in this respect. Over a period of time it must be obvious that explicit instructions to the suppliers would gradually become wholly necessary. Moreover, the possibility of rejection was no doubt much more effective than explicit instructions in advance. In other words, undoubtedly, new suppliers merely followed the motions of those who invited them to join the enterprise.

The plaintiff asks that the individual defendant Wagner be enjoined as well as the corporate defendant. There is no suggestion, however, that Wagner personally carried on any business during the period complained of, and while he does indeed dominate the corporate defendant I cannot see that it is necessary to enjoin him in his personal capacity.

The plaintiff is entitled to the relief which it seeks against the corporate defendant with costs; the judgment is to be settled on notice. The defendant Wagner, for the reasons stated, is entitled to a judgment, without costs, dismissing the complaint.

I have filed findings of fact and conclusions of law.

HAROLD M. KENNEDY
Harold M. Kennedy
United States District Judge

History of the Act of October 26, 1949, Known as Fair Labor Standards Amendments of 1949 (63 Stat. 910)

On August 9th, 1949, after the original House Bill (H. R. 5856) was reported out by the House Committee on Education and Labor, Mr. Lucas of Texas, on the floor, offered a complete substitute bill which he had filed (H. R. 4272) as a substitute amendment to the House Bill. *Neither the original House Bill nor the original Lucas Bill contained the so-called Cooper amendment.*

The Lucas substitute bill was debated on August 10th, and amendments *to it* were made, among them a proposed exemption offered by Mr. Cooper of Tennessee with respect to rural homeworkers. The debate on the Cooper amendment covers 3 columns on pages 11432-3 of the Congressional Record of August 10th. Its relevant portions are separately set forth below.

On the same day, the Lucas substitute bill, *as amended,* including the Cooper amendment, was adopted and was then incorporated into the House Bill which was at the same time again reported out by the Committee on Education and Labor (Cong. Rec. of August. 10th, p. 11451). On August 11th, the new House Bill was passed *without debate.* On August 31st, the Senate passed its own bill amending the Act. The Senate Bill contained no provision such as the Cooper amendment. Both bills went to conference. The Conference Report, after briefly reciting the amendment contained in the House Bill under the title: "Rural home workers", states the following: "The Senate amendment contained no such exemption. The Conference agreement follows the Senate amend-

ment in this respect." The new House Bill as approved in Conference was passed by both Houses on October 18th.

Debate on the Cooper Amendment

(Cong. Rec. of August 10th, 1949, pp. 11432-3.)

Mr. Cooper: Mr. Chairman, *this is in the nature of a clarifying amendment.* I have discussed it with the distinguished gentleman from Texas, author of the substitute and, as I understand from him, the amendment is agreeable. May I ask the gentleman from Texas if that is correct?

Mr. Lucas: I am glad to respond to the gentleman as I responded to him when he earlier approached me in this matter. *I do not think the amendment is necessary in my bill, but if the gentleman insists upon its insertion I shall offer no objection.*

* * * *

Mr. Cooper: The situation is that in my part of the country, and I assume in many other sections of the country, there are certain women, principally housewives in rural areas and on farms, who make certain crocheted and knitted articles, principally for children. There is no doubt, in my opinion, but what they are independent contractors and never were intended to be covered by this type of legislation, but in order to remove any uncertainty, and to meet the situation that was raised by one of the administrators of the Wage and Hour Division, I think it is appropriate to try to clarify the situation here.

* * * *

Mr. Lucas: *I want it definitely understood that these people the gentleman wishes to exempt are not in the employ of anyone. They are simply selling things.*

* * * *

Mr. Cooper: Mr. Chairman, the situation sought to be taken care of by this amendment may be briefly stated as follows: There are several hundred women throughout Tennessee, mostly around Gibson County, which is in my congressional district, and the adjoining counties, who have for several years made crocheted and knitted articles of wearing apparel, principally for babies, and sold them to anybody who might want to purchase them. In recent years Mrs. Doris Harwood, of R. F. D., Trenton, Tenn., has been operating a small business from her home, about 4 miles from Trenton. She buys these articles from the women of that section, who are largely farmers' wives, who crochet garments for children and sell them to her at an agreed price and she in turn sells them to her customers.

She sometimes sells the yarn to these women as a matter of convenience, but has nothing to do with the keeping of their time nor with superintending their work, nor has any supervision or control over them, and they can sell the finished article to any other person they may desire. It is impossible for her to keep the time or keep up with them if there were any desire on her part to do so.

It is my understanding that the Wage and Hour Division of the Department of Labor through the regional office at Birmingham, Ala., has notified Mrs. Harwood that she could not buy any of this crocheted wearing apparel from any of these women unless they were physically handicapped and that they were

required to have a medical certificate to this effect before they could make these articles and sell them to her.

The women that I have in mind who make these articles are housewives and women not otherwise employed. While some of them are physically handicapped and confined to their homes, yet there are some of them who make these articles in their spare time while engaged in their housework in order to make a little money. Most of them are women who have to remain in the home because of their responsibilities there and are only too happy to make some of these articles from time to time and sell them and thereby make a little money to help in meeting the expenses of their families.

It was my privilege to be a Member of Congress at the time the wage-and-hour law was passed and I feel confident that it was never the intention of Congress for it to apply in a case of this kind. I think there can be no doubt that these women are independent contractors and that it was never intended that they should be covered by the provisions of this law. I think this amendment will take care of this situation.

The Chairman: The time of the gentleman from Tennessee has expired. The question is on the amendment offered by the gentleman from Tennessee (Mr. Cooper).

The amendment was agreed to.

(Italics supplied.)

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Statute:

Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201, *et seq.*:

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Sec. 6 4
Sec. 11(c) 4
Sec. 11(d) 2, 10
Sec. 15(a)(1) 4
Sec. 17 4

Miscellaneous:

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95 Cong. Rec. 14927 15
29 C.F.R. (1949 ed.):
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§ 617.101 8
29 C.F.R. (1954 Cum. Supp.):
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 563

EDWARD S. WAGNER CO. INC., PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court on the first trial (Pet. 30-40)[1] and on the second trial (R. III 23-31) are reported at 89 F. Supp. 304 and 115 F. Supp. 118, respectively. The two opinions of the Court of Appeals (Pet. 25-29; 22-23) are reported at 187 F. 2d 977 and 217 F. 2d 303, respectively.

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[1] "Pet." refers to the petition before the Court; R. I and R. II refer to the petitioner's and the respondent's appendices to their briefs in the court below on the first appeal, incorporated in the record below by stipulation; R. III refers to the petitioner's appendix to its brief below on the second appeal.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1954 (Pet. 24). The petition for certiorari was filed on January 25, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 63 Stat. 910, 29 U.S.C. 201 *et seq.*, are:

Sec. 3. As used in this Act—*Definitions.*

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work. [29 U.S.C. 203]

Sec. 11. * * * *Investigations, inspections, records and homework regulations.*

* * * * *

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to pre-

vent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are continued in full force and effect. [29 U.S.C. 211(d)]

The pertinent Regulations adopted pursuant to the Fair Labor Standards Act of 1938 are:

§ 516.21 *Industrial homeworkers*—(a) *Definitions.* (1) "Industrial homeworker" and "homeworker," as used in this section, mean any employee employed or suffered or permitted to perform industrial home work for an employer.

(2) "Industrial home work," as used in this section, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

(3) The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production" as used in this section is the same as in the act. [29 C.F.R. § 516.21]

PART 617—*Knitted Outerwear Industry, Minimum Wage Order, Home Workers*

* * * * *

§ 617.101 *Definitions*

* * * * *

"Industrial homeworker" and "homeworker," as used in this part, mean any employee employed or suffered or permitted to perform industrial home work for an employer.

"Industrial home work," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production. [29 C.F.R. § 617.101]

QUESTION PRESENTED

Whether homeworkers, who before the effective date of the Fair Labor Standards Act were employees of a concern selling infants' wear, ceased to be employees under a "new plan" pursuant to which they "sell" articles knitted by them at home to the petitioner at "prices" which include the exact cost of the materials plus a piece rate for labor.

STATEMENT

This action was filed under Section 17 of the Fair Labor Standards Act to enjoin petitioner from violating the minimum wage, record-keeping and shipping provisions of the Act (Sections 6, 11(c) and 15(a)(1)) and from violating the regu-

lations restricting the employment of homeworkers in the Knitted Outerwear Industry (29 C.F.R. 617 (R. I 2-8; R. III 3-5)). The case has been tried twice and also heard twice by the Court of Appeals. Though the facts were stipulated on the second trial, the record on the first appeal was incorporated by reference as a part of the record.

The petitioner, a New York corporation established in 1939, and its president, Edward S. Wagner, are engaged in the interstate sale and distribution of articles of infants' knitted outerwear made by individuals in their homes. Mr. Wagner's engagement in this business dates from 1924 or 1926 (R. II 21, 24). Until 1937 he operated under the trade-name of Flagstaff Knitting Company or Flagstaff Knitting Mills (R. II 21-22). Thereafter, and until April, 1940, when petitioner corporation became active, the business was conducted under two trade-names, Flagstaff Knitting Mills and Edward S. Wagner Company (R. III 17-19, 35-36). At all times, however, the business has been actively managed by Wagner. (R. III 18, 35).

The very existence of the business depends upon the use of homeworkers, the company having no machinery of its own (R. I 37). The homeworkers in question are women who, for the most part, reside in the New England States (R. III 19, 37). They produce the entire line of goods handled by petitioner and its predecessor in business, consisting of booties, caps and sacques (R. III 17, 35).

Prior to the enactment of the Fair Labor Stand-

ards Act, the yarn used in crocheting the booties, caps and sacques, as well as designs, samples, patterns and instructions, were furnished to the homeworkers (R. III 18, 36); during this period the only thing which they supplied themselves, besides their labor, was the crochet needle or hook which cost only about 10 cents (R. III 21, 38).

After the passage of the Act and admittedly in an effort to avoid the Act's application, a "new plan" of dealing with the homeworkers was devised (R. II 26). Under the "new plan," as explained in a letter sent to some 200 of the homeworkers (R. I 36),[2] they were advised that "the company was in the market to purchase finished goods made by them," (R. II 26) and the "new plan" was explained as follows: "A worker is allowed to buy the material and work for herself, making booties, sacques or sets, and then sell them back to the company at a given price, which we will state" *infra,* p. 17). The letter made it clear, however, that the rate per dozen garments would be increased to include the cost of the material to the worker: "We will give you the name of a company, who will sell you yarn or silk at $1.60 per pound. * * * We will weigh the goods when we receive it and we will add on the exact cost of the amount of the material used. Our scales are very accurate. * * * We also guarantee to buy back any yarn or silk you have at $1.60 per pound, whenever you care to

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[2] This letter is reprinted as an appendix to this brief, (*infra,* pp. 17-18).

give up the work" (*infra*, pp. 17-18). After explaining the details of the plan, the letter added: "This is the only way we can transact business with you, as you will be your own boss" (*infra*, p. 18). The letter written by Mr. Wagner, frankly stated that the new plan was being devised to avoid the wage and hour law: "A new wage and hour law went into effect on April 1st, which makes it impossible for us to send you any more homework, but, we are working on a new plan, which is perfectly legal and all the other large knitgoods companies are already doing it." (*infra*, p. 17).

Upon adopting the "new plan," the company also stopped furnishing designs and patterns to the homeworkers. But, as stated in Judge Kennedy's opinion, there are only "three major designs" and minor differences "are not of very grave importance and if they were, the evidence discloses that from time to time the defendants informed their suppliers concerning what was wanted in this respect. Over a period of time it must be obvious that explicit instructions to the suppliers would gradually become wholly unnecessary" (Pet. 39-40).

The homeworkers have always been paid on a piece rate basis, i.e., so much per dozen garments (R. III 36, 38). The rates are generally fixed by petitioner (R. III 38) and admittedly do not yield the homeworkers as much as 75 cents an hour (R. III 39.[3] No homeworkers is under a legal obliga-

[3] The evidence at the first trial indicated that the rates did not yield as much as 25 cents per hour, and in some cases possibly as little as 6 cents per hour (R. II 24).

tion to send her entire output to petitioner, Similarly, petitioner is under no obligation to accept the entire output of any homeworker.[4] The services of the homeworkers in supplying petitioner's needs are an integral part of its business (R. I 121).

On the basis of these facts, two separate trial judges (Kennedy, D. J., and Galston, D. J.), and the Court of Appeals, all held the homeworkers to be employees within the meaning of the Fair Labor Standards Act. Judge Kennedy concluded that the homeworkers were in substance "ordinary pieceworkers" and as such "are in every fair sense of the word employees" within the meaning of the Act (Pet. 35, 38). Though the Court of Appeals agreed that the homeworkers were employees under the Act, it reversed on the ground that the regulations dealing with homeworkers did not include petitioner's homeworkers (Pet. 26-29).[5] The regulations were then amended.[6] When the case was retried, Judge Galston agreed with Judge Ken-

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[4] The basis for refusing proffered goods was that the merchandise was not "merchantable according to the standards of the company" (R. I 52).

[5] The Regulations in effect at the time of the original complaint defined "industrial homeworker" as a person "producing in or about a home, for an employer, goods from material furnished directly by or indirectly for such employer." (29 C.F.R. (1949 ed.) 516.11 footnote). And in the Regulation dealing specifically with the Knitted Outerwear Industry the term "industrial home work" was similarly defined. (29 C.F.R. (1949 ed.) 617.101).

[6] The regulations as rewritten included homeworkers "regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker." 29 C.F.R. 516.21, 617.101, *supra*, pp. 3-4.

nedy that the homeworkers were employees, and held that the amended regulations were valid and now included petitioner's homeworkers. On appeal from this second trial court decision, the Court of Appeals affirmed Judge Galston's "well-reasoned conclusions" (Pet. 23) that the amended regulations apply to petitioner's operations and were validly promulgated.[7]

ARGUMENT

The decision below is correct; it accords with principles well settled by the decisions of this Court, and does not conflict with the decision of any other Court of Appeals.

1. In holding the homeworkers to be petitioners' employees, the courts below correctly applied well-settled principles. There can be no doubt that "homeworkers generally are included in the statutory definition of 'employee'." *Walling* v. *American Needlecrafts,* 139 F. 2d 60, 64 (C. A. 6), and *Walling* v. *Twyeffort, Inc.,* 158 F. 2d 944 (C. A. 2), certiorari denied, 331 U. S. 851, cited with approval in *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, 729. Such workers are clearly within the scope and purposes of the Fair Labor Standards Act, and may not be employed unless there is compliance with the Act's requirements and all applicable regulations issued under it. See *Gemsco* v. *Walling,* 324 U. S. 244, 251-252, 258, 259; *United*

[7] Petitioner does not raise in this Court any question concerning the promulgation and applicability of the amended regulations (Pet. 7).

States v. *Rosenwasser,* 323 U. S. 360, 363. Accord: *Harwood* v. *Tobin,* 194 F. 2d 538 (C. A. 6), affirming *per curiam* the decision of the district court (not officially reported), 10 WH Cases 73, 19 Labor Cases Par. 66, 199 (W. D. Tenn., 1951); *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F. 2d 633 (C. A. 4), certiorari denied, 338 U. S. 900; *Fleming* v. *Palmer,* 123 F. 2d 749 (C. A. 1), certiorari denied *sub nom. Caribbean Embroidery Cooperative* v. *Fleming,* 316 U. S. 662. See also *Schwing* v. *United States* and *Wanamaker* v. *United States,* 165 F. 2d 518 (C. A. 3); *United States* v. *Vogue, Inc.,* 145 F. 2d 609 (C. A. 4), arising under the Social Security Act.

If there ever was any doubt of the coverage of homeworkers, it has been definitely dispelled by the 1949 amendments to the Act conferring on the Administrator power to restrict or entirely to prohibit homework. Section 11(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 211(d) *supra,* pp. 2-3).

The question presented by this case is whether the changes made in the method of dealing with the homeworkers by petitioner's "new plan" were sufficient to remove them from the protection of the Act. In resolving this question against petitioner, District Judge Kennedy relied primarily upon the tests supplied by this Court's decisions in *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, and *United States* v. *Silk,* and *Harrison* v. *Greyvan Lines,* 331 U. S. 704 (Pet. 34-36). The homeworkers are unquestionably an integral part

of the business (see *Rutherford,* p. 729). They work with only a crochet needle or hook, obviously "simple tools" (*Silk,* p. 718; *Rutherford,* p. 725). Their investment in these "simple tools" is negligible in amount (cf. *Greyvan* case, p. 719). They are fully reimbursed for the cost of the yarn which in any event represents a negligible investment because they buy only in "small quantities" (R. III 21). Their "profits" depend not so much upon "initiative, judgment or foresight of the typical independent contractor" but rather upon the number of pieces they turn out (*Rutherford,* p. 730).

Walling v. *Portland Terminal Co.,* 330 U. S. 148, relied on by petitioner (Pet. 8), deals with an entirely different question. Unlike the railroad trainees in the *Portland Terminal* case, the homeworkers here are not crocheting booties, sacques and caps "for their own advantage" (*Rutherford* decision, 331 U. S. at 729) without any expectation of compensation from anyone for their work, but, like the boners in the *Rutherford* case, perform services which are a vital and integral part of petitioner's business. Petitioners cite the *Portland Terminal Co.* case as indicating that there must be a "hiring" agreement "to work for an employer for compensation" before there can be an employer-employee relationship. (Pet. 8-9). But this Court's subsequent decisions plainly contradict the need for any explicit hiring agreement. In answer to a similar contention advanced in the *Rutherford Food* case, this Court pointed out (331 U. S. at 729) that in *Williams* v. *Jacksonville*

Terminal Co., 315 U. S. 386, it had "accepted a stipulation that 'redcaps' were railroad employees," although the railroad paid them no compensation, their compensation being derived solely from passengers' tips. And in the *Silk* case (331 U. S. 704, at 712-713) the Court emphasized that social legislation of this type is not to be given "a constricted interpretation" based on "technical concepts" of an employer's legal responsibility in other contexts: "Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." (*Id.* at 712).

2. There is no conflict among the circuits. On the contrary, the courts which have ruled on this issue have consistently and unanimously held homeworkers to be employees entitled to the Act's benefits. *Harwood* v. *Tobin*, 194 F. 2d 538 (C. A. 6), affirming *per curiam* the decision of the district court (not officially reported), 10 Wage Hour Cases 73, 19 Labor Cases Par. 66,199 (W. D. Tenn., 1951); *Walling* v. *American Needlecrafts*, 139 F. 2d 60 (C. A. 6); *Fleming* v. *Palmer*, 123 F. 2d 749 (C. A. 1), certiorari denied *sub nom. Caribbean Embroidery Cooperative* v. *Fleming*, 316 U. S. 662; see also the decisions by the court below in other cases involving homeworkers: *Gemsco* v. *Walling*, 144 F. 2d 608 (C. A. 2), affirmed, 324 U. S. 244; *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944

(C. A. 2), certiorari denied, 331 U. S. 851, cited with approval in *Rutherford Food Corp* v. *McComb*, 331 U. S. 722, 739. See also *Schwing* v. *United States* and *Wanamaker* v. *United States*, 165 F. 2d 518 (C. A. 3), arising under the Social Security Act; *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. A. 4).[9]

The *Harwood* case, *supra*, involved precisely the same method of operation as is here presented. The homeworkers in *Harwood*, like the homeworkers here, supplied knitted garments under an arrangement whereby they purchased their own yarn and thread from sources independent of the defendant-distributor to whom the finished products were delivered. In the instant case, as in *Harwood*, the relationship with the homeworkers was rearranged so as to convert them into so-called "independent producers", frankly for the purpose of avoiding the requirements of the Act. The Tennessee district court held that there was an employment re-

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[9] Numerous federal district court decisions have consistently reached the same result. *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N.D. Ill., 1942), reversed on other grounds, 133 F.2d 306 (C.A. 7), certiorari denied, 319 U.S. 771; *Walling* v. *Muncie Novelty Co.*, 6 W.H. Cases 557 (S.D. Ind., 1946); *Walling* v. *Hastings*, 6 W.H. Cases 554 (S.D. Ind., 1946); *Walling* v. *Freidlin*, 66 F. Supp. 710 (M.D. Pa.), over-ruling *Walling* v. *Todd*, 52 F.Supp. 62 (M.D. Pa.); *Walling* v. *Schweitzer*, 6 W.H. Cases 283 (D.C. Puerto Rico, 1946); *Fleming* v. *Demeritt Co.*, 56 F.Supp. 376 (D. Vt.); *Walling* v. *Sieving*, 9 Wage Hour Rept. 356 (N.D. Ill., 1946); *Nelson* v. *Kuepper Favor Co.*, 4 Wage Hour Rept. 699 (N.D. Ill., 1941); *Mason* v. *T. & P. Optical Mfg. Co.*, 42 F.Supp. 98 (S.D. N.Y.); *Walling* v. *Frank*, 62 F.Supp. 261 (W.D. Ky.); *Walling* v. *Wolff*, 63 F.Supp. 605 (E.D. N.Y.).

lationship between defendant *Harwood* and the homeworkers within the meaning of the Act and enjoined defendant from violating both the requirements of the Act and the Administrator's regulation restricting the employment of homeworkers. The arrangement, said the court, was "devised to circumvent the provisions of the Act" as was evident from the fact that the workers "continued to operate substantially as theretofore, except the yarns or threads were not purchased from the defendants." (10 W. H. Cases 73, 19 Labor Cases 66,199). The short *per curiam* opinion of the Sixth Circuit affirmed the district court's judgment simply on the authority of *Walling* v. *American Needlecrafts,* 139 F. 2d 60 (C. A. 6) and *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722.

The soundness of the *Harwood* decision, and of the decision below, in finding no significant distinction between these cases and the numerous other homeworker cases, is confirmed by the legislative action at the time the 1949 Amendments to the Act were under consideration. A proposed amendment by Congressman Cooper of Tennessee, to which petitioner refers (Pet. 15, 41-44), was designed to exempt precisely the kind of homeworker operation carried on by *Harwood* and Wagner. It would have exempted from the Act "any home worker in a rural area who is not subject to any supervision or control by any person whomsoever, *and who buys raw material and makes and completes any article* and sells the same to any person, even though it is made according to specifications

and the requirements of some single purchaser" (Section 13(a)(17) of H. R. 5856; italics supplied). This amendment, according to its sponsor, Congressman Cooper of Tennessee, would have exempted housewives in his part of the country "who have for several years made crocheted and knitted articles of wearing apparel, principally for babies, and sold them to anybody who might want to purchase them" (95 Cong. Rec. 11209). The Senate bill contained no such exemption. The Conference agreement followed the Senate in this respect and contained no exemption for homeworkers. The Conference report makes clear that this omission was not unintentional. House Rep. No. 1453, 95 Cong. Rec. 14933. On the contrary, the Conference added the new subsection Section 11 (d) (*supra,* pp. 2-3) continuing in full force and effect administrative regulations theretofore issued restricting industrial homework in a number of industries, and, in addition, authorized the Administrator to restrict or entirely to prohibit homework. 95 Cong. Rec. 14927.

3. From the foregoing it seems clear that the legal principles involved in this case are not in dispute. The only real issue is the application of those principles to the particular facts of the present case. Both the court below and the district court, not once but twice each, have been in complete agreement on their analyses of the facts here involved. It is well settled that this Court will accept as final the concurrent findings of two lower

courts. *Comstock* v. *Group of Investors*, 335 U.S. 211, 213-214.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY, 1955

APPENDIX

Plaintiff's Exhibit 2, P—1

FLAGSTAFF KNITTING CO.,
1261 BROADWAY, NEW YORK CITY,

June 8, 1939.

DEAR MISS NORTON: Received bootees OK. Niagara Shawl Co. just phoned me and said that you ordered 2½ lbs. of yarn. This will be shipped to you in a day or two. Please try to pay them for this yarn as soon as possible. Do not take 30 days if you can help it.

A new wage and hour law went into effect on April 1st, which makes it impossible for us to send you any more homework, but, we are working on a new plan, which is perfectly legal and all the other large knitgoods companies are already doing it.

This is the new plan:

A worker is allowed to buy the material and work for herself, making booties, sacques or sets, and then sell them back to the company at a given price, which we will state. For instance, we will give you the name of a company, who will sell you yarn or silk at a $1.60 per pound, (this is strictly the wholesale price same as we are paying for it in 100 lb. lots). There are 16 ounces to the pound which brings the price to 10¢ an ounce. You of course must pay for the yarn or silk, whichever it may be.

For instance, you are making #212 for which we pay 80¢ per doz. We are going to raise this

price to 95¢ per dozen. Your work weighs about 5 ounces per dozen, which means 50¢ worth of materials used. You will sell us every dozen for $1.45 per dozen. This of course includes the material used and the 95¢ for the labor. We will weigh the goods when we receive it and we will add on the exact cost of the amount of the material used. Our scales are very accurate. The parcel post will be paid by us. We will send you your check for work sent in, within 5 days after we receive it.

If you are interested and you care to continue working under this plan, and selling the merchandise to us, please let us hear from you and we will give you the name of the yarn dealer where you can order your yarn or silk. We also guarantee to buy back any yarn or silk you have at $1.60 per pound, whenever you care to give up the work. This is the only way we can transact business with you, as you will be your own boss. The yarn or silk will belong to you and you will sell us the sacques, sets, booties, whichever it may be. There will be no deductions for social security.

Let us hear from you at once, if this interests you. You can start off by buying enough yarn or silk for one dozen or as much as you wish.

If you are over 65 years of age, let us know, as workers over 65 are exempt from this law, and we can continue sending them work as before.

Very truly yours,

FLAGSTAFF KNITTING CO.

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Enid